

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 308 OF 2016

1. Smt. Kusum Arun Salunkhe
Age: 53 years, Occupation : Service
2. Rajani Arun Salunkhe
Age: 29 years, Occupation: Household
3. Jayashri Arun Salunkhe
Age: 27 years, Occupation: Advocate

All residents of: Government Milk Scheme,
Government Quarter, C-16,
Chakkarbardi Road, Dhule,
Taluka and District Dhule

... Petitioners

Versus

1. Shri Gulabrao Suklal Patil
Age: 55 years, Occupation: Service & Agriculture
Resident of: At Post Shevali,
Taluka Sakri, District Dhule
2. Shri Ravindra Suklal Patil
Age: 52 years, Occupation: Service & Agriculture

Both residents of: At Post Shevali,
Taluka Sakri, District Dhule
3. Shri Yashwant Arjun Salunkhe
[Deceased]
4. Sau Gojarbai Yashwant Salunkhe
[Deceased]
5. Shri Sunil Vasantrao Gangurde
Age: Major, Occupation: Agriculture
6. Sau Jyoti Vasantrao Gangurde
Age: Major, Occupation: Household

Both residents of: At Post Shevali,
Taluka Sakri, District Dhule

... Respondents

...
Advocate for Petitioners : Mr. Mukul S. Kulkarni
Advocate for Respondent Nos. 1 & 2 : Mr. Devidas Shelke h/f
Mr. P R. Patil
...

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 14th JANUARY, 2022

PRONOUNCED ON : 31st JANUARY, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.
2. This petition is directed against the order dated 02-11-2015 passed by the learned Joint Civil Judge, Senior Division, Dhule, in Civil Misc. Application No.404/2013, thereby allowing the application filed by respondent Nos. 1 and 2, under Order 9 Rule 13 of the Code of Civil Procedure (for short C.P.C.), seeking restoration of Special Civil Suit No.25/2007.
3. The petitioners filed Special Civil Suit No.25/2007 for partition, separate possession of the suit property and for the declaration that transactions of the suit property done by defendant Nos. 1 and 2 (i.e. respondent Nos. 3 and 4 herein) in favour of defendant Nos. 3 and 4 (i.e. respondent Nos. 1 and 2 herein), be declared null and void and not binding upon the petitioners – plaintiffs. The suit proceeded ex-parte

against all the defendants and was decreed by the judgment dated 19-03-2010.

4. Being aggrieved by the judgment and decree passed by the trial Court, defendant Nos. 3 and 4 on 21-12-2012 preferred Civil Appeal No.74/2012 in the District Court, Dhule. During the pendency of the appeal, defendant Nos. 3 and 4 (i.e. respondent Nos. 1 and 2 herein) also filed Civil Misc. Application No.299/2012 which was subsequently numbered as Civil Misc. Application No.404/2013, under Order 9 Rule 13 of C.P.C. for setting aside ex-parte decree and restoration of the suit. The said application is allowed by the trial Court by imposing cost of Rs.3,000/-. The petitioners are aggrieved by this decision.

5. Heard the learned advocate Mr. M. S. Kulkarni for the petitioners and learned advocate Mr. Devidas Shelke h/f Mr. P. R. Patil for respondent Nos. 1 and 2.

6. The learned advocate for petitioners assailed the impugned order contending that, since the appeal filed by respondent Nos. 1 and 2, challenging the judgment and decree passed in the suit, was pending before the appellate Court, the trial Court was not justified in entertaining the application filed by them under Order 9 Rule 13 of C.P.C. In support of this submission, he relied on **Vijay Prabhakar**

Salunke Vs. Kamini S. Dadarkar, reported in **2001 (2) Mh.L.J. 955**. He further submitted that without there being any reasonable cause, though respondent Nos. 1 and 2 belatedly approached the trial Court by filing application under Order 9 Rule 13, however, without giving sufficient reason the said delay was condoned by the trial Court and the reason given while allowing the said application under Order 9 Rule 13 is that, since the delay was already condoned the application is allowed, as no opportunity of hearing was given to the respondents. He further submitted that without withdrawing the appeal, respondents' application for setting aside the ex-parte decree was allowed. The trial Court has erroneously held that since the respondents has filed undertaking that they are going to withdraw the appeal, the application can be allowed. He, therefore, submitted that the impugned order is contrary to the decision in **Vijay Prabhakar Salunke** (supra) and hence, the same is liable to be quashed and set aside.

7. The learned advocate for respondent Nos. 1 and 2, on the other hand, supported the impugned order by relying on the decision in **Kausabai Keshav Dushinge Vs. Revubai Daji Jare and Others**, reported in **1996 (3) Bom.C.R. 326**. He also relied on the decision in **Rani Choudhury Vs. Lt. Col. Suraj Jit Choudhury**, reported in **1982 (2) SCC 596**. He submitted that it is clear from record that collusive decree is

obtained by the petitioners – plaintiffs and none of the the respondents – defendants had opposed the suit. The respondents being purchaser have interest in the suit properties. In that view of the matter the trial Court was right in allowing the application filed under Order 9 Rule 13 by respondent Nos. 1 and 2. In terms of the undertaking, the respondents have withdrawn the appeal in the month of November, 2015 itself after the order was passed by the trial Court. The suit is restored and fair opportunity needs to be given to the respondents to contest the suit on merits. He, therefore, submits that there is no substance in the petition and the petition deserves to be dismissed.

8. It is not in dispute that the respondents availed the remedy of appeal challenging the judgment and decree passed in Special Civil Suit No.25/2007 and simultaneously have filed application under Order 9 Rule 13. It further appears from record that Misc. Civil Application No.299/2012, under Order 9 Rule 13, was filed on 07-12-2012 along with the delay condonation application. It is the case of the respondent Nos. 1 and 2 (i.e. defendant Nos. 3 and 4) that on receipt of the suit summons they approached the other defendants and they were assured by the defendants that the suit properties are their self acquired properties and the other defendants will take care of the suit and presence of respondent Nos. 1 and 2 is not required in the suit. The

respondents, therefore, relied on the assurance given by the other defendants and did not prosecute the suit. The suit was decided without giving any opportunity to respondent Nos. 1 and 2.

9. The trial Court condoned the delay of 2 years and 8 months in filing restoration application and has allowed the application on the ground that respondent Nos. 1 and 2 have their rights in the suit property. The Suit, which was decreed, was for partition and possession and it was decided without giving opportunity to the respondents. Therefore, by accepting the undertaking given by respondent Nos. 1 and 2 to withdraw the appeal, the trial Court allowed Civil M. A. No.404/2013, by imposing cost of Rs.3,000/-.

10. It is, thus, clear from record that the suit was not contested by any of the defendants. The reason given by respondent Nos. 1 and 2 for not contesting the suit appears to be probable. Otherwise, there was no reason and/or occasion for respondent Nos. 1 and 2 not to contest the suit when their valuable right to property was involved in the suit. There appears substance in the contention of respondent Nos. 1 and 2 that, deliberately none of the defendants contested the suit and the suit was allowed to be decreed ex-parte. In these circumstances, fair opportunity to contest the suit on merits needs to be given to respondent Nos. 1 and 2 as their right to property is involved in the suit.

11. In **Vijay Prabhakar Salunke** (supra), in October, 1997, application under Order 9 Rule 13 of C.P.C. was filed without filing any application for condonation of delay. In November, 1997, the judgment debtor challenged the ex-parte decree in the High Court along with delay condonation application, which was transferred to the District Court, Alibag. In these facts, this Court held that ‘when a judgment debtor has already invoked appellate jurisdiction during the pendency of application under Order 9 Rule 13 and he was still prosecuting the appeal, the application under Order 9 Rule 13 was not maintainable’.

12. In the case in hand, though it is a fact that appeal was filed by respondent Nos. 1 and 2 prior in point of time and they also moved application under Order 9 Rule 13 for setting aside the ex-parte decree, however, they had filed an undertaking before the trial Court that they will withdraw the appeal. In that view of the matter, this ruling would not be applicable in the facts of the present case.

13. In **Kausabai Keshav Dushinge** (supra) this Court has held that:-

“3. When an ex parte decree is passed against the defendant, he has remedies more than one available though the scope of inquiry would be different in different remedies. An ex parte decree may be set aside in an application under Order 9, Rule 13 wherein the applicant - defendant will have to show that there was sufficient cause

for his failure to appear when the suit was called for hearing in the Court and in an appeal under section 96 he would be able to challenge the decree on merits. There is nothing in the Civil Procedure Code to bar simultaneous resort to both of them. On the contrary, it appears that from the explanation inserted vide section 59 of the Code of Civil Procedure (Amendment) Act, 1976 (Explanation No. II as per the Bombay Amendment) that both remedies can be resorted to subject to the limitation that if the appeal is disposed of on any ground other than the withdrawal by the appellant, then an application under Order 9, Rule 13 would not be maintainable.

4. *The words 'no application shall lie' will have to be interpreted to mean that after the disposal of the appeal otherwise than for withdrawal, no application could be filed as well as application pending shall stand abated. Similar is the position in respect of the appeal also. If an application under Order 9, Rule 13 is filed and the decree is also challenged in Appeal under section 96 and application under Order 9, Rule 13 is allowed and the ex parte decree is set aside, then the appeal automatically abates since there is no decree in existence which is challenged in the appeal. Therefore, both the remedies can be resorted to and if either of them is disposed of or is decided, then it would affect continuance of the other remedy.*

5. *In the case of Rani Choudhury v. Lt. Col. Suraj Jit Choudhury, A.I.R. 1982 S.C. 1397, Supreme Court was pleased to observe : "He (defendant) could also appeal under section 96 against the decree. The mere filing of the appeal did not take away the jurisdiction of the trial Court to entertain and dispose of the application for setting aside the ex parte decree. It was where the appeal was disposed of, and the appellate decree superseded the trial Court decree by reversing, confirming or varying it that the trial Court could not proceed to set aside its ex parte decree." Therefore, it is amply clear that mere filing of the appeal does not take away right of the trial Court to hear and decide the application under Order 9, Rule 13. So also, mere filing of the application under Order 9, Rule 13 does*

not take away Appellate Court's right to hear and decide the appeal."

This ratio supports the case of respondent Nos. 1 and 2.

14. Coming to the facts of the present case, if the petition is allowed and the impugned order passed by the trial Court, setting aside the ex-parte decree, is set aside, then the respondents will be rendered remediless as they have already withdrawn their appeal. At the cost of repetition, it is to be noted that none of the defendants have contested the suit. In that view of the matter, fair opportunity to contest the suit needs to be given to respondent Nos. 1 and 2.

15. For the aforestated reasons, I do not find any merit in the challenge raised in the present petition. The trial Court was justified in allowing the application filed by respondent Nos. 1 and 2. Therefore, the writ petition is dismissed. Rule discharged.

16. Considering the fact that the suit is of the year 2007, the trial Court is directed to expedite the hearing of the suit and decide the same within a period of six months from the date of receipt of writ of this order.

(NITIN B. SURYAWANSHI, J.)